No. 89-2001 and No. 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in these cases. Petitioners have consented to INGAA's filing of this brief. The consent of the respondents was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States.

The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

These cases involve orders of the Commission which permitted natural gas pipelines to direct bill their customers for certain production costs that the Commission had previously required the pipelines to pay producers for past sales of gas. The United States Court of Appeals for the District of Columbia Circuit held that notwithstanding the Commission's finding of "good cause" for waiving the notice requirement in Section 4(d) of the NGA, the direct billing by the pipelines of such costs constituted retroactive ratemaking in violation of the filed rate doctrine.

The issue in these cases is therefore similar to the issues presented in *FERC* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2016 (filed June 21, 1990), in which the Commission has sought review of another D.C. Circuit opinion which held that a Commission order authorizing a pipeline's recovery of take-or-pay costs using the purchase deficiency methodology prescribed in Order No. 500 violated the filed rate doctrine by permitting retroactive ratemaking. *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"). INGAA has filed a motion for leave to file *amicus curiae* in support of the Commission's petition for writ of certiorari in that case.

The costs at issue herein are substantial. They total approximately $1.5 billion for the industry, and approximately $500 million with respect to the five pipelines—all of which are INGAA members—which sought to direct bill their costs and for which direct billing was authorized by the Commission. The court of appeals' decision, if affirmed, will constitute yet another impediment to the transition of pipelines from their former role primarily as gas merchants to a new role in which they are predominantly gas transporters. This necessary transition cannot be completed unless and until pipelines have put behind them the disputes and resulting costs of restructuring their gas purchase arrangements.

Over and above the impact of the court of appeals' decision on the ability of pipelines to recover their costs in a manner consistent with current competitive markets, the decision represents an unjustified extension of the filed rate doctrine, a misinterpretation of the rule against retroactive ratemaking, and a failure to accord proper deference to the Commission's ratemaking expertise.

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Cana-

dian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

SUMMARY OF ARGUMENT

This case presents another in a series of recent decisions by the United States Court of Appeals for the District of Columbia Circuit relying on the "filed rate doctrine" to usurp the authority of the Commission to establish just and reasonable rates. *See Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) (*"AGD II"*), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016); *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344). The extended procedural history of the decision below graphically illustrates the seriously adverse effects of the D.C. Circuit's rulings in this area. As will be explained in this Brief, the D.C. Circuit has adopted a novel, and legally unsupportable, interpretation of the filed rate doctrine with which to reject the Commission's determination that certain purchased gas costs incurred by pipelines may not be recovered by means of a direct bill. Contrary to the lower court's decision, the rates at issue in this case neither violate the filed rate doctrine nor authorize unlawful retroactive collection. These rates were properly filed with the Commission and were found by the Commission to be just and reasonable when they were put into effect.

Because this case presents issues similar to those raised by the Commission in its petition for writ of certiorari in *AGD II*, INGAA recommends that certiorari be granted in the instant cases.

ARGUMENT

This case graphically illustrates the seriously adverse and inequitable effects of the D.C. Circuit's restatement of the filed rate doctrine. In 1978, the Commission issued interim regulations allowing producers to apply on an individual basis for recovery of production-related costs. 43 Fed. Reg. 56,448; 56,575-56,577 (1978). Two years later, the Commission decided to defer any assessment of such costs until completion of a "generic," industry-wide proceeding but stated that its final rule would authorize recovery of the costs for the period required to complete the rulemaking. *See* Order No. 94, 45 Fed. Reg. 53,099 (1980), FERC Stats. & Regs. [Regulations Preambles 1977-81] ¶ 30,178 (1980). A final rule was not issued until 1983. Order No. 94-A, 48 Fed. Reg. 5152 (1983), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,419 (1983). The Fifth Circuit subsequently affirmed Order No. 94-A and specifically approved the collection of production-related costs within the guidelines provided by Order No. 94-A. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

The protracted proceedings engaged in by the Commission and the generous allowances provided by its final rule resulted in the payment of extremely large lump sum costs. Given this background, and the enormous pressure being imposed on pipeline rates by the general industry restructuring then underway, the Commission authorized collection of these costs by means of a direct bill. The D.C. Circuit rejected these orders in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988)

(*"Columbia I"*). The court held that such direct billing constituted retroactive ratemaking in violation of the filed rate doctrine because "downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased." 831 F.2d at 1140. In so holding, the court stated that the purpose of the filed rate doctrine is to maintain "predictability" in the rates that will be charged and concluded that the challenged orders provided no such predictability for the pipelines' downstream customers. 831 F.2d at 1141 (*citing Electrical District No. 1* v. *FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985)).

On remand, the Commission concluded that direct billing of production-related costs covered by Order No. 94-A was warranted "in the context of the overriding public interest in the orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which will thereby result." *Transcontinental Gas Pipe Line Corporation*, 45 FERC ¶ 61,169 at 61,487 (1988). In doing so, the Commission concluded that, in light of the dramatic changes in natural gas markets which had occurred during the protracted proceedings involving Order Nos. 94 and 94-A (in particular the Commission's efforts to restructure natural gas markets based on competitive market principles), a direct billing cost recovery mechanism was needed to achieve an equitable allocation of costs without unduly disturbing market signals to pipeline customers. *Id.* at 61,486-61,487. Notwithstanding the Commission's clear affirmation that a direct billing mechanism was necessary to achieve equity and the goal of allowing natural gas prices to be set by competitive market forces, the D.C. Circuit again set aside the Commission's order. *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) (*"Columbia II"*), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131).

INGAA urges the Court to put an end to the regulatory stalemate engendered by the D.C. Circuit's action in this and other cases. In this instance, interstate pipelines have endured a ten-year wait—first for clarification of their obligations to pay and now for authorization to collect the costs arising from Order No. 94. The D.C. Circuit has never suggested that the production-related costs at issue are not proper costs for passthrough to pipeline customers. Instead, it has made passthrough a practical impossibility and has thereby thwarted the Commission's regulatory reform efforts. Simultaneously, it has effectively penalized the interstate pipelines involved in this case (in an amount in excess of $500 million in production-related costs incurred by them) for acting in reliance on the Fifth Circuit's decision that collection of production-related costs was properly authorized. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d at 1066.

Interstate pipelines subject to the Commission's jurisdiction are statutorily entitled to a reasonable opportunity to recover their prudently incured costs. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Order No. 94 costs at issue herein were found by the Fifth Circuit in *Texas Eastern* to be owing to the producers pursuant to Section 110 of the NGPA, 15 U.S.C. § 3320 (1988). Such costs accordingly are entitled to be treated as prudently incurred costs, and thus pipelines must be afforded a reasonable opportunity to recover them. Indeed, Section 601(c) of the NGPA, 15 U.S.C. § 3431(c) (1988), guarantees that, absent fraud, abuse, or similar grounds, pipelines may pass through any amounts paid with respect to any purchase of natural gas, including costs such as production-related costs covered by Section 110. Therefore, neither the Commission nor any court has authority to preclude pipeline recovery of these costs.

Only this Court can put an end to the lower court's serious misapplication of the governing statutory provisions. The appellate courts and the Commission must be

given clear guidance so that regulated interstate pipelines can know the rules under which they must operate and thus do business with reasonable assurance that the current regulatory uncertainty will be terminated.

In this regard, it is important for the Court to note that the D.C. Circuit's decision in this case is only one of a series of decisions grounded in its peculiar interpretation of the relationship between the filed rate doctrine and the retroactive ratemaking doctrine. The D.C. Circuit has recently applied the reasoning adopted in *Columbia I* as its basis for holding in *AGD II* that the Commission's purchase deficiency method of allocating take-or-pay costs violated the filed rate doctrine. *AGD II*, 893 F.2d at 355-356. INGAA has filed a motion for leave to file a brief *amicus curiae* in support of petitioner, the Commission, in that proceeding. *FERC* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2016 (filed June 21, 1990). Similarly, in *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344), the D.C. Circuit has relied on its view of the filed rate doctrine to prohibit a pipeline from relying on direct billing to recover certain amounts in its purchased gas adjustment account. *Id.* at 577 (*citing Columbia I* and *Electrical District No. 1, supra*).

INGAA submits that certiorari should be granted in this proceeding for the same reasons set forth in INGAA's brief *amicus curiae* in *AGD II*; that is, the D.C. Circuit has incorrectly and unjustifiably expanded the filed rate doctrine and the rule against retroactive ratemaking and has thereby improperly limited the Commission's ratemaking authority by substituting its judgment for that of the Commission. As noted by the Commission and the pipelines in their respective petitions for certiorari herein, the D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II*. Fur-

thermore, as explained by the Commission, in practical terms, both cases are related since they both involve the allocation of costs by pipelines in the wake of an industry restructuring to promote competitive market conditions.

It is clear that pipelines are entitled to a reasonable opportunity to recover prudently incurred costs and to guaranteed passthrough of gas purchase costs pursuant to the provisions of NGPA Section 601(c).[1] Not only will the D.C. Circuit's decision affect recovery of costs, it will also have the predictable effect of prolonging regulatory uncertainty and thus will exacerbate the disruption attendant on the Commission's massive restructuring of the industry.

INGAA supports the Commission's assertion that the Supreme Court's disposition of *AGD II* will shed considerable light on the appropriate disposition of this case. Nevertheless, there are material differences in the facts underlying each case. Accordingly, INGAA submits that each case should be addressed on the merits individually, applying the Court's ruling on the proper application of the filed rate doctrine and the retroactive ratemaking doctrine to each case, as appropriate.

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[1] To the extent that recovery of costs is limited to adding such costs to the pipelines' commodity rates, the D.C. Circuit has conceded that the result is tantamount to a denial of cost recovery. *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1025-1026 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (*"AGD I"*).

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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